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Ong Teik Thai v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–26–02 OF 2012(P)
ARIFIN ZAKARIA CHIEF JUSTICE, RAUS SHARIF PCA, ZULKIFLI CJ (MALAYA), AHMAD MAAROP AND HASAN LAH FCJJ
4 JANUARY 2016

C

Criminal Law — Common intention — Proof of — Whether there was reasonable doubt as to identification of appellant as one of persons acting in concert

D *Criminal Procedure — Appeal — Appeal against conviction and sentence — Whether prosecution failed to prove prima facie case against appellant — Misdirection — Whether trial judge glossed over material evidence with regard to identification and common intention — Whether trial judge failed to consider credibility of vital witnesses for prosecution — Whether failure amounted* E *to serious misdirection — Whether trial judge made maximum evaluation of evidence at the close of prosecution's case — Whether appellate intervention necessary — Whether appellant entitled to acquittal*

F On 6 April 2006, Choi Yu Ki ('the deceased') was found murdered at the front of premises No 17, Pekan Teluk Kumbar, Penang. The pathologist who performed the autopsy certified the cause of death to be multiple slash wounds. The case for the prosecution turned on the evidence of three witnesses namely, SP5, SP6 and SP8. According to the eyewitness, SP5, while he was having a drink in a coffee shop in Teluk Kumbar, he had seen the deceased and three G others including SP6 and SP8 make their way to their respective motorcycles parked by the roadside in front of the coffee shop. Just then, a Proton Waja car had come by and knocked down their motorcycles causing them to fall off. When the deceased approached the driver of the car, four men with yellow coloured hair had alighted from the car armed with a *parang* each. These four H persons had then chased after the deceased and SP8, who had run across the road. When the deceased fell, the four persons had repeatedly slashed the deceased. SP6 testified that he saw five persons assaulting the deceased with samurai swords and that one of those five was the appellant. In his evidence, SP6 said two of the five persons went after the deceased first and slashed the I deceased. Then, three other persons came and they also slashed the deceased. The other witness for the prosecution, SP8, who was with the deceased when the driver and four others, including the appellant, came out of the car armed with *parangs* testified that the deceased shouted to him to run away, which he did. SP8 said that about five minutes later he came back to the scene and saw

the deceased lying on the floor of the shop across the road with multiple slash wounds. The appellant was apprehended and charged with murder. The charge against the appellant was that he together with four other persons at large had committed murder in furtherance of their common intention, an offence punishable under s 302 of the Penal Code read with s 34 of the same Code. The appellant was convicted of the offence and sentenced to death. His appeal to the Court of Appeal was dismissed and he preferred an appeal to this court. In this appeal, the appellant contended that the trial judge had failed to consider that the credibility of the vital witness for the prosecution on the crucial issue of identity was doubtful. In response, the prosecution admitted that although there were contradictions in the evidence of SP6 and SP8 in their description of the appellant when they saw him at the scene, the incident happened so fast that it was difficult to expect the witnesses to say the same things in their evidence in court according to what they had seen at the scene.

Held, allowing the appeal and setting aside his conviction and sentence:

(1) As the charge against the appellant was that he together with four other persons at large had committed murder in furtherance of their common intention, the proof of common intention under s 34 of the Penal Code was crucial. Therefore, at the close of the prosecution's case, there had to be sufficient evidence to prove that the appellant was acting in concert with the other four persons still at large in the commission of the murder of the deceased. If there was a reasonable doubt that he was acting as such or if there was a reasonable doubt as to the identification of the appellant as one of the persons acting as such, then the prosecution had failed to prove a prima facie case against the appellant entitling him to an acquittal. In the present case, there were contradictions in the evidence given by SP5 and SP6, in that SP5 testified that four men with yellow coloured hair had attacked the deceased, while SP6 claimed there were five assailants. Further, based on SP6's testimony it was doubtful as to whether SP6 had actually seen the appellant slashing the deceased as he claimed. In fact, SP6 contradicted himself in his own evidence. As such, the credibility and the weight to be attached to SP6's evidence was questionable (see paras 7 & 12–17).

(2) Further, SP6 testified that the appellant was not bald. This clearly contradicted the evidence of SP8 who said that the appellant was bald at the material time. That contradiction, which was material, in the light of the crucial issue of the identification of the appellant at the scene, raises the question of credibility of SP6 and SP8. It is primarily the evaluation of SP6's and SP8's evidence which would forge the essential finding as to the appellant's culpability on the offence charged by the operation of s 34 of the Penal Code. In the present case the trial judge had glossed over the material evidence with regard to identification and common intention. Although the trial judge had considered the discrepancy in the evidence

of SP5 and SP6 respectively regarding the number of persons seen by them alighting from the car, there was nothing in his judgment to show that he had considered the material contradictions within SP6's own evidence, and the material contradictions between SP6's evidence and that of SP8 regarding the description and the identification of the appellant at the scene of the offence, or the ultimate vital question whether in view of the contradictions it was safe to rely on their evidence. That failure was a serious misdirection on the part of the trial judge in his handling of the issue of identification of the appellant, which was so crucial to the question whether the prosecution had established a prima facie case against the appellant. This misdirection (by way of non-direction) alone was sufficient to warrant appellate intervention (see paras 18–19 & 21).

(3) There was no finding made by the trial judge on the specific act done by the appellant in furtherance of the common intention which was crucial in a case such as this where reliance was placed on s 34 of the Penal Code. This was another serious misdirection that led to the conclusion that the trial judge had not made maximum evaluation of the evidence at the close of the prosecution's case, which had occasioned a serious and substantial miscarriage of justice warranting appellate interference (see para 21).

[Bahasa Malaysia summary

Pada 6 April 2006, Choi Yu Ki ('si mati') telah dijumpai dibunuh di depan premis No 17, Pekan Teluk Kumbar, Pulau Pinang. Ahli patologi yang melakukan autopsi mengesahkan sebab kematian adalah beberapa luka kelaran. Kes bagi pihak pendakwaan adalah berdasarkan keterangan tiga saksi iaitu SP5, SP6 dan SP8. Menurut saksi, SP5, semasa beliau sedang minum di kedai kopi di Teluk Kumbar, beliau telah nampak si mati dan tiga yang lain termasuk SP6 dan SP8 berjalan menuju ke motorsikal masing-masing yang diletakkan di tepi jalan di hadapan kedai kopi. Kemudian, sebuah kereta Proton Waja telah lalu di situ dan melanggar motorsikal mereka lalu menyebabkan mereka jatuh. Apabila si mati menghampiri pemandu kereta itu, empat orang berambut kuning telah turun dari kereta itu dengan masing-masing bersenjatakan parang. Empat orang itu kemudian mengejar si mati dan SP8, yang telah berlari ke seberang jalan. Apabila si mati jatuh, empat orang itu telah mengelar si mati berulang kali. SP6 telah memberikan keterangan bahawa beliau telah nampak lima orang menyerang si mati dengan pedang samurai dan salah seorang daripada lima orang itu ialah perayu. Dalam keterangannya, SP6 menyatakan bahawa dua daripada lima orang itu telah terlebih dahulu mengejar si mati dan mengelar si mati. Kemudian, tiga orang lagi datang dan mereka juga turut mengelar si mati. Saksi pendakwaan yang lain, SP8, yang berada bersama si mati semasa pemandu dan empat yang lain, termasuk perayu, keluar daripada kereta bersenjatakan parang memberikan keterangan bahawa si mati telah menjerit kepadanya menyuruhnya melarikan

diri, yang dia telah lakukan. SP8 selanjutnya menyatakan bahawa lima minit kemudian dia telah kembali semula ke tempat kejadian dan nampak si mati terbaring di atas lantai kedai di seberang jalan dengan beberapa luka kelaran. Perayu telah ditahan dan dituduh dengan tuduhan membunuh. Pertuduhan ke atas perayu ialah dia bersama empat yang lain yang masih bebas telah membunuh dengan niat bersama, suatu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan dibaca bersama s 34 Kanun yang sama. Perayu telah disabitkan atas kesalahan itu dan dijatuhkan hukuman mati. Rayuannya ke Mahkamah Rayuan telah diketepikan dan dia kemudiannya merayu ke mahkamah ini. Dalam rayuan ini, perayu menghujahkan bahawa hakim bicara telah gagal mempertimbangkan bahawa kredibiliti saksi utama pihak pendakwaan tentang isu identiti yang penting boleh disangsikan. Semasa membalas, pihak pendakwaan mengakui bahawa walaupun terdapat percanggahan dalam keterangan SP6 dan SP8 tentang perihalan perayu semasa mereka nampak perayu di tempat kejadian, kejadian itu berlaku terlalu pantas dan adalah sukar untuk menjangkakan saksi-saksi untuk menyatakan perkara yang sama dalam keterangan mereka di mahkamah berdasarkan kepada apa yang mereka telah lihat di tempat kejadian.

Diputuskan, membenarkan rayuan dan mengetepikan sabitan dan hukuman:

(1) Memandangkan pertuduhan ke atas perayu adalah bahawa perayu bersama empat orang yang lain yang masih bebas telah melakukan bunuh bagi maksud meneruskan niat bersama, pembuktian niat bersama di bawah s 34 Kanun Keseksaan adalah penting. Oleh itu, di akhir kes pendakwaan, perlu ada keterangan yang mencukupi untuk membuktikan bahawa perayu telah bertindak bersama-sama dengan empat orang yang lain yang masih bebas dalam melakukan pembunuhan ke atas si mati. Jika terdapat keraguan yang munasabah bahawa perayu telah melakukan sedemikian atau jika terdapat keraguan munasabah tentang pengecaman ke atas perayu sebagai salah seorang yang melakukan sedemikian, maka pihak pendakwaan telah gagal membuktikan suatu kes prima facie terhadap perayu dan perayu berhak untuk dilepaskan dan dibebaskan. Dalam kes ini, terdapat percanggahan dalam keterangan yang diberikan oleh SP5 dan SP6, yang mana SP5 memberikan keterangan bahawa empat lelaki berambut kuning telah menyerang si mati, manakala SP6 menyatakan terdapat lima penyerang. Selanjutnya, berdasarkan keterangan SP6, terdapat keraguan sama ada SP6 telah benar-benar melihat perayu mengelar si mati sebagaimana yang dia nyatakan. Malah, SP6 telah menyanggahi keterangannya sendiri. Oleh itu, kredibiliti dan berat yang boleh diletakkan ke atas keterangan SP6 boleh dipersoalkan (lihat perenggan 7 & 12–17).

(2) Selanjutnya, SP6 memberi keterangan bahawa perayu tidak botak. Keterangan ini dengan jelas bercanggah dengan keterangan SP8 yang menyatakan bahawa perayu botak pada masa yang material itu.

A Percanggahan itu, yang merupakan percanggahan yang material, bagi maksud isu penting tentang pengecaman perayu di tempat kejadian, menimbulkan persoalan tentang kredibiliti SP6 dan SP8. Secara asasnya, penilaian ke atas keterangan SP6 dan SP8 yang akan membawa kepada dapatan kebersalahan perayu ke atas pertuduhan yang dipertuduhkan
B dengan penggunaan s 34 Kanun Keseksaan. Dalam kes ini hakim bicara telah menilai kesemua keterangan yang material mengenai pengecaman dan niat bersama. Walaupun hakim bicara telah mempertimbangkan percanggahan dalam keterangan SP5 dan SP6 mengenai bilangan orang yang dilihat keluar dari kereta, tidak terdapat apa-apa pun dalam
C penghakimannya yang menunjukkan bahawa beliau telah mempertimbangkan percanggahan yang material dalam keterangan SP6 sendiri, dan percanggahan material antara keterangan SP6 dengan SP8 berkenaan dengan deskripsi dan pengecaman perayu di tempat kesalahan
D berlaku, atau persoalan yang paling utama iaitu sama ada memandangkan terdapat percanggahan adalah selamat untuk bergantung kepada keterangan mereka. Kegagalan itu merupakan suatu salah arah yang serius yang dilakukan oleh hakim bicara dalam pengendalian beliau tentang isu pengecaman perayu, yang terlalu
E penting kepada soalan sama ada pihak pendakwaan telah membuktikan suatu kes prima facie atau tidak terhadap perayu. Salah arah ini (dengan cara tidak mengarahkan) sahaja sudah mencukupi untuk membenarkan campur tangan rayuan (lihat perenggan 18–19 & 21).

(3) Tidak terdapat dapatan yang dibuat oleh hakim bicara tentang perbuatan
F spesifik yang dibuat oleh perayu bagi maksud meneruskan niat bersama yang amat penting dalam suatu kes seperti ini yang bergantung kepada s 34 Kanun Keseksaan. Ini merupakan satu lagi salah arah yang serius yang membawa kepada kesimpulan bahawa hakim bicara telah tidak memberikan penilaian maksimum ke atas keterangan di akhir kes
G pendakwaan, yang membawa kepada ketidakadilan yang serius dan besar yang mengizinkan campur tangan rayuan (lihat perenggan 21).]

Notes

For a case on proof of common intention, see 4(1) *Mallal's Digest* (5th Ed,
H 2015) para 141.

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 321–500.

Cases referred to

I *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP* [1987] 2 MLJ 336; [1987] 1 CLJ 540; [1987] CLJ Rep 241, SC (refd)

Adiswaran a/l Tharumaputrintar v PP and other appeals [2014] 3 MLJ 228; [2014] 3 CLJ 813, FC (refd)

Balachandran v PP [2005] 2 MLJ 301, FC (refd)

Erivesto Anderson & Anor v PP [2009] 1 MLJ 593, FC (refd)
Krishna Govind Patil v State of Maharashtra 1963 AIR 1413, SC (refd)
Mannam Venkatdri And Ors v The State of Andhra Pradesh AIR 1971 SC 1467, SC (refd)
Ng Yau Thai v PP [1987] 2 MLJ 214, SC (refd)
Om Prakash v State AIR 1956 All 241, HC (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37; [2005] 1 CLJ 466, CA (refd)
Shamsuddin bin Hassan & Anor v PP [1991] 3 MLJ 314; [1991] 1 CLJ Rep 428, SC (refd)
Wan Yurillhami bin Wan Yaacob & Anor v PP [2010] 1 MLJ 749 at p 764; [2010] 1 CLJ 17, FC (refd)

Legislation referred to

Indian Penal Code [IND] s 34, 302
Penal Code ss 34, 302

Appeal from: Criminal Appeal No P-05–257 of 2010 (Court of Appeal, Putrajaya)

Hisyam Teh Poh Teik (Ranjit Singh Dhillon with him) (Teh Poh Teik & Co) for the appellant.
Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmad Maarop FCJ:

[1] The appellant was charged in the High Court with the charge that he together with four other persons still at large in furtherance of their common intention murdered one Choi Yu Ki on 6 April 2006 at about 10pm at the front of premises No 17, Mk 9, Pekan Teluk Kumbar, Penang, an offence punishable under s 302 of the Penal Code read with s 34 of the same Code. He was convicted of the offence and sentenced to death. His appeal to the Court of Appeal was dismissed. He preferred an appeal to this court.

[2] The evidence led by the prosecution in the High Court is as follows. On 6 April 2006 at about 10pm Chong Hun Hoe alias Tonny ('SP5'), while having a drink at the front of Aik Bee Coffee Shop, Teluk Kumbar, saw the deceased Choi Yu Ki whom he knew as 'Ah Ki' coming out of the same coffee shop together with three other male Chinese including SP6 (Cheng Hock Lye alias Amokia), and one male Indian ('SP8'), Mani Vanan a/l Shamagum. As the deceased and SP8 sat on their respective motorcycles parked by the roadside in front of the coffee shop, a Proton Waja car came and knocked down their motorcycles resulting in both of them falling down on the road. The deceased got up and approached the driver of the car. The four doors of the car were

A simultaneously opened and four yellow coloured hair persons alighted from the said car. Each of them was armed with a *parang*. The deceased and SP8 ran across the road. The four persons gave chase. The deceased then stumbled and fell on the ground. According to SP5, from where he was seated (about 40–50 ft away), he saw all the four persons repeatedly slashing the deceased B with *parangs* before fleeing from the scene in the same car.

[3] According to SP6, at about 9pm on 6 April 2006 he and his friends including the deceased left the coffee shop as it was about to close. As he was about to sit on his motorcycle which was parked behind the shop, PW6 heard C a sound of collision, and as he turned around he saw the deceased standing beside a car bearing registration No 4051. PW6 was then only about 4–5 ft behind the said car. From that distance he saw five persons coming out of the said car armed with samurai swords about 3–4 ft long. SP6 identified one of D them as 'Ah Thai' who was the appellant in court. SP6 said two of the five persons went after the deceased first followed later by the three other persons. Having caught up with the deceased who had fallen down after hitting the pipe line at the scene, all of them then slashed him. SP6 claimed that he had seen the appellant at Tua Pek Kong in Matang two days earlier in a fist fight where the E deceased punched a member of the appellant's gang in the presence of the appellant.

[4] SP8 testified that he was with the deceased when the latter confronted the driver of the car which had knocked them down earlier. At the time when F the driver opened the door of the car, SP8 saw the appellant seated in the middle of the back passenger seat of the car. SP8 said when the driver of the car was coming out of the car armed with a *parang*, the deceased shouted to him to run away. The deceased ran towards the direction of Bayan Lepas while SP8 ran towards Bagan. About five minutes later, SP8 came back to the scene and saw G the deceased lying on the floor of the shop across the road with multiple slash wounds on his neck, body and legs. The car which had knocked them down earlier was nowhere to be seen. SP8 and SP6 then helped sending the deceased to Pantai Hospital where he was pronounced dead about an hour later. Dr Bhupinder Singh a/l Jeswant ('SP9'), the pathologist who performed the H autopsy certified the cause of the deceased's death to be multiple slash wounds.

[5] Before us, the complaint of the appellant is that at the close of the prosecution's case there was no maximum evaluation of the evidence adduced by the prosecution. Learned counsel for the appellant submitted that SP6 was I the most important witness for the prosecution because he was the only witness who said in evidence that the appellant was one of the five persons who slashed the deceased. SP5 and SP8 who claimed to be at the scene, never testify to that. Thus, according to learned counsel, the prosecution's case in the present appeal, was no different from a case in which the prosecution was premised on

the evidence of a single witness. Learned counsel argued that the evidence of this single witness ('SP6') was contradicted by SP8 on a material particular — on the issue of recognition and identification of the appellant. In this regard, according to learned counsel, both SP6 and SP8 claimed that they knew and recognised the appellant before the incident. Yet whilst SP6 said in cross-examination that the appellant had hair and that the five persons who attacked the deceased had red and yellow coloured hair, SP8 testified that the appellant was bald (*berkepala botak*). Learned counsel contended that was a serious contradiction between two key witnesses for the prosecution who claimed to know the appellant before the incident but was surprisingly unable to give a proper description of the appellant in court. This aspect of the contradiction with regard to the recognition and identification of the appellant ought to have been clarified by the prosecution. In addition, learned counsel also pointed out the contradiction in the evidence of SP6 and SP8 regarding the time they saw the appellant at the fight at Matang. Learned counsel also drew our attention to the contradiction in the evidence of SP5 and SP6 with regard to the number of persons who attacked the deceased. Apart from that, learned counsel also submitted that SP6 was an interested witness as he was a close friend of the deceased. Rounding up his submission, learned counsel contended that the credibility of the vital witness for the prosecution on the crucial issue of identity was doubtful. This, according to learned counsel was not considered by the learned trial judge. Learned counsel contended that there was a serious doubt at the close of the prosecution's case and that the defence of the appellant should have not been called.

[6] In his reply, learned deputy public prosecutor admitted that there were contradictions in the evidence of SP6 and SP8 in their description of the appellant when they saw him at the scene. The learned deputy submitted that the incident happened so fast that it was difficult to expect the witnesses to say the same things in their evidence in court according to what they had seen at the scene. The learned deputy contended that in the face of the contradictions between the evidence of SP6 and SP8, the learned trial judge was entitled to prefer the evidence of one witness and not the other. In this regard the learned deputy submitted that SP8 was a more reliable witness. He relied on the judgment of this court in *Erivesto Anderson & Anor v Public Prosecutor* [2009] 1 MLJ 593 and *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15.

DECISION OF THE COURT

[7] The charge against the appellant is that he together with four other persons at large committed murder in furtherance of their common intention. So, the proof of common intention under s 34 of the Penal Code is crucial. In this regard, in *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 at p 344; [1987] 1 CLJ 540;

A [1987] CLJ Rep 241 at pp 251–252, Syed Agil Barakbah SCJ (delivering the judgment of the Supreme Court) said:

> In law, common intention requires a prior meeting of the minds and *presupposes some prior concert*. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was (a) a common intention to commit the very offence of which the accused persons are sought to be convicted and (b) *participation in the commission of the intended offence in furtherance of that common intention*.
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> Where the prosecution case rest on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference. Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused. (*The Supreme Court (of India) on Criminal Law* (1950–1960) by JK Soonavala pp 188–193).

[8] In *Om Prakash v State* AIR 1956 All 241 it was held that participation of the individual offender in the criminal act in some form or the other is the leading feature of s 34 of the Penal Code. A person present at the scene might or might not be guilty of s 34. If he is present at the scene for the purpose of participating in the offence, he would certainly be guilty as a participator in the offence. On the other hand, if he is present there merely as a spectator, he would not be guilty. Explaining the aforesaid proposition, Beg J said:

> (14) *Participation of the individual offender in the criminal act in some form or the other which is the leading feature of s 34 IPC* differentiates it not only from s 149 IPC, but also from other affiliated offences like criminal conspiracy and abetment. A bare agreement between two or more persons to do or cause to be done an illegal act might make a person liable for the offence of criminal conspiracy as defined in s 120 IPC If the said agreement is to commit offence, then such an agreement is by itself enough to make a man guilty and no overt act apart from the agreement would be necessary.
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> If, however, the agreement is to commit an act which is not tantamount to an offence, then some overt act in pursuance thereof is necessary. Such overt act may, however, be performed by any person who is a party to the agreement and not necessarily by the particular accused who might be guilty of the offence without having participated in the act.
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> *On the other hand, under s 34 IPC, a mere agreement, although it might be a sufficient proof of the common intention, would be wholly insufficient to sustain a conviction with the application of s 34 IPC, unless some criminal act is done in furtherance of the said common intention and the accused himself has in some way or the other participated in the commission of the said act.*
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> (15) Similarly a person might be guilty of the offence of abetment by virtue of his previous association with the offence without having actually participated in it. This previous association would consist of his instigation to commit an offence in one of

the ways defined in s 107 Penal Code.

The offence itself would be complete even though the act abetted is not committed; or, even if the act is committed, the abettor himself has not participated in it. *Thus, actual participation in the commission of the offence, which is a condition precedent of s 34 and is its main feature, again distinguishes it from the offence of abetment.*

(16) Section 34 IPC, compendiously summarises the liability imposed under English Law on what are therein called as principal in the first degree and principal in the second degree and assimilates the principles underlying both by compressing them in one section and treating them as what have been called *accessories at the fact* as opposed to what are termed as *accessories before the fact* and *accessories after the fact*.

(17) In this connection, the learned counsel for the appellant argued that a person who is present on the spot at the time of the commission of the offence would be guilty by the application of s 34 IPC although such a person did not do anything. This criticism appears to me to be based on a misapprehension.

A person present on the scene might or might not be guilty by the application of s 34 IPC. If he is present on the scene for the purpose of participating in the offence, he would certainly be guilty as a participator in the offence. On the other hand, if he is present there merely as a spectator, he would not be guilty.

Thus for example a person who is *an eyewitness* of the incident is present at the spot as well as a person who is *a confederate* of the assailant. The former is not guilty because he is present merely to see the commission of the crime. *On the other hand, the latter is guilty because he is present for the purpose of seeing that the crime is committed. In other words, presence on the spot for the purpose of facilitating or promoting the offence is itself tantamount to actual participation in the criminal act …*

…

It is, therefore, *evident that every person charged with the aid of s 34, must in some form or the other participate in the offence in order to make him liable thereunder*. For the above reason, I find myself unable to endorse the argument of the appellants' learned counsel that a guilty associate merely present on the spot cannot be said to participate in the commission of the offence.

[9] In *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37; [2005] 1 CLJ 466, the Court of Appeal explained the necessary elements under s 34 of the Penal Code which we find useful:

Thus to attract s 34 IPC two postulates are indispensable; (1) the criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person (2) doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.

Looking at the first postulate pointed out above, *the accused who is to be fastened with liability on the strength of s 34 IPC should have done some act which has nexus with the offence*. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an

> omission can, in certain circumstances, amount to an act. This is the purport of s 32 IPC. So the act mentioned in s 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, eg a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. *Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section*. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, s 34 IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of s 34 IPC. (Emphasis added.)

[10] In *Wan Yurillhami bin Wan Yaacob & Anor v Public Prosecutor* [2010] 1 MLJ 749 at p 764; [2010] 1 CLJ 17 at p 35 this court opined:

> It is a well established principle of law in dealing with the criminal liability under s 34 of the Penal Code that a pre-concert or pre-planning may develop on the spot or during the course of the commission of the offence, but the crucial test is that such plan must precede the act constituting the offence. The existence of common intention is a question of fact and in each case it may be proved as a matter of inference from the circumstances of the case (see the cases of *Mahbub Sha v Emperor* AIR 1945 PC 118 and *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344) ...

[11] In *Adiswaran a/l Tharumaputrintar v Public Prosecutor and other appeals* [2014] 3 MLJ 228; [2014] 3 CLJ 813 the learned deputy public prosecutor submitted that the prosecution had established a common intention to commit the offence of murder because it had been proven that the first accused was holding a knife, the third accused holding a *parang* in the presence of the second and the fourth accused near the deceased, who was lying down on the floor with head injuries. This court did not accept the submission. It reiterated the principle on common intention stated in *Namasiyiam*, *Om Prakash* and *Wan Yurillhami* and concluded that:

> [86] The prosecution's case rested on circumstantial evidence. In our view there was insufficient circumstantial evidence, at the end of the prosecution's case, that the second to the fourth accused caused the death of the deceased in furtherance of a common intention. *There was no evidence to prove that the second, third and fourth accused were present at the scene as confederates of the first accused.*

[12] Reverting to the present appeal, there is no doubt that Choi Yu Ki had died and that the cause of his death was multiple slash wounds. According to PW9 there were 51 injuries on the deceased's body out of which 41 were slash wounds. Considering the nature of wounds inflicted on the deceased, it cannot

be denied that the intention of the person who inflicted the injuries was to kill or at least to cause bodily injuries which were sufficient in the ordinary course of nature to cause death. The offence committed was murder but the crucial issue which lies at the heart of this case was the identification of the appellant. At the close of the prosecution's case, is there sufficient evidence to prove that the appellant was acting in concert with the other four persons still at large in the commission of the murder? Is there sufficient evidence to establish his participation in the commission of the murder in furtherance of their common intention in the sense explained earlier? Is there sufficient evidence to establish that he was present at the scene for the purpose of participating in the murder? If there is a reasonable doubt that he was acting as such or if there is a reasonable doubt as to the identification of the appellant as one of the persons acting as such, then the prosecution has failed to prove a prima facie against the appellant entitling him to an acquittal (see *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 at p 316).

[13] The case for the prosecution turns on the evidence of three witnesses (SP5, SP6 and SP8). Recounting the evidence of SP5, on 6 April 2000 at about 10pm while having a drink at the front of Aik Bee Coffee Shop, Teluk Kumbar, he saw the deceased whom he knew as 'Ah Ki' coming out of the same coffee shop together with three other male Chinese including SP6, and a male Indian (SP8). According to SP5 the three male Chinese left the coffee shop on foot. SP6 and SP8 proceeded to their respective motorcycles which were parked in front of the coffee shop. They then started their motorcycles' engine but before they moved, a car suddenly appeared and knocked down their motorcycles resulting in both of them falling down on the road. The deceased got up and approached the driver of the car. The four doors of the car simultaneously flung open and four persons alighted from the car. Each of them was armed with a *parang*. Although SP5 saw the deceased and SP8 running across the road, the four persons giving chase and later repeatedly slashing the deceased who had fallen down, SP5 did not identify the appellant as one of the four persons, or for that matter even being present at the scene. This leaves the evidence of SP6 and SP8. SP6 testified that he saw five persons assaulting the deceased with samurai swords. This is what he said at p 25 of the appeal record Vol I:

> Dari jarak tersebut saya nampak Ah Ki dipukul. Sebelum dipukul, saya nampak Ah Ki berlari ke seberang jalan dan terjatuh apabila kakinya tersadong besi. Ah Ki berlari ke seberang jalan sebab orang yang berada di dalam kereta tersebut mempunyai senjata. *Kesemua lima orang yang memukul Ah Ki, tetapi saya dapat cam seorang sahaja*. Saya nampak mereka memukul Ah Ki dengan pedang samurai. Panjang pedang samurai tersebut adalah dalam 3–4 kaki (as demonstrated by SP6 with his two hands). *Lima orang yang memukul Ah Ki ini sebelum itu keluar dari kereta silver tersebut*. Di persekitaran di mana kereta tersebut berada mempunyai lampu dan ketika pintu kereta silver terbuka, lampu di dalamnya menyala. Kesemua empat-empat pintu kereta tersebut terbuka. Saya hanya kenal seorang sahaja dari lima orang yang keluar dari dalam kereta tersebut iaitu Ah Thai. Saya

A mengecam Ah Thai kerana polis meminta saya mengecam beliau. Selepas kejadian ini, saya ada diminta polis menghadiri satu kawat cam.

[14] This contradicts the evidence of SP5 who clearly said that the four doors of the car were simultaneously opened and four yellow coloured hair persons B alighted from the said car, each armed with a *parang*. These four persons went after the deceased and SP8 who ran across the road. When the deceased fell, the four persons repeatedly slashed the deceased.

C **[15]** In the passage just referred to, SP6 said he identified one of the five persons who came out of the car. He referred to this person as Ah Thai and in court he identified this person as the appellant. In the last four lines in the same passage, SP6 said he knew (*kenal*) one of the five persons who came out of the car Ah Thai, 'saya hanya kenal seorang sahaja dari lima orang yang keluar dari D dalam kereta tersebut iaitu Ah Thai'. This is inconsistent with what he said in the next paragraph on the same page when said that he saw the appellant for the first time on the day of the incident, 'saya hanya nampak Ah Thai buat kali pertama pada hari kejadian tersebut'. Immediately after that, SP6 contradicted himself again when he said, 'Sebelum hari kejadian Ah Ki dipukul tersebut, E saya pernah nampak Ah Thai. Saya pernah nampak beliau di Matang. Saya nampak beliau pada hari Selasa iaitu dua hari sebelum hari kejadian. Hari kejadian ialah pada hari Khamis. Saya nampak Ah Thai di Matang pada hari Selasa tersebut di Tua Peh Kong iaitu tempat sembahyang'. If it was indeed recognition which had enabled SP6 to identify the appellant in court, then F there is no reason why there should be contradiction in his evidence as aforesaid for which no explanation was provided by him.

[16] In his evidence under examination-in-chief (p 27 Vol I of the appeal record), SP6 said two of the five persons went after the deceased first and G slashed the deceased. Then, three other persons came and they also slashed the deceased 'mula-mula dua orang mengejar dan menetak Ah Ki, selepas itu tiga orang lain datang dan juga menetak Ah Ki. Mereka menetak Ah Ki sehingga Ah Ki tidak bermaya'. SP6 gave evidence of similar effect under cross-examination, 'Semasa dua orang yang menetak Ah Ki tersebut mengejar H dan menetak Ah Ki, Ah Thai masih berada di kereta' (p 32, Vol I of the appeal record). This contradicts SP5's evidence who said the four doors of the car flung open and four persons came out, each of whom was armed with a *parang*. The four persons went after the deceased. The deceased fell and SP5 saw the four persons slashing the deceased with their *parangs*. In other words, the four I persons came out of the car almost at the same time and the four of them together went after the deceased and slashed him repeatedly when he fell.

[17] As shown earlier, in his evidence SP6 identified the appellant as one of the five persons who slashed the deceased. In cross-examination, it was put to

SP6 that he did not know which part of the deceased's body was slashed by the appellant because actually he did not see the latter slashing the former. SP6 disagreed. That part of the cross-examination is as follows:

PUT: Kamu tidak tahu bahagian anggota badan mana Ah Ki Ah Thai tetak kerana sebenarnya kamu tidak nampak Ah Thai menetak tetapi hanya tahu Ah Thai berada di situ.

J: Tak setuju, kerana saya *nampak bahagian belakang* badan Ah Thai yang sedang menetak Ah Ki.

In other words, the appellant's back was facing SP6 when the former was slashing the deceased. How was it possible for him to identify the appellant just by looking at the latter's back was not explained by SP6. That, however is not all. This part of SP6's evidence contradicts his earlier evidence as shown in the following exchange in cross-examination:

S: Adakah kelima-lima orang yang menetak Ah Ki tersebut memakai topeng.

J: Kesemua mereka tidak memakai topeng.

S: Adakah diantaranya yang pakai helmet.

J: Tidak ada.

S: Adakah diantaranya yang pakai topi atau cap.

J: Tak ingat, kerana *saya hanya nampak muka seorang sahaja, kerana semasa beliau menetak Ah Ki muka dan badannya menghadap saya*.

S: Cuba ingat samada ada yang memakai cap.

J: Tiga orang berambut kuning seorang berwarna merah dan tak pasti samada Ah Thai memakai cap atau tidak, *tetapi saya pasti beliau berambut*.

S: Setuju, jika Ah Thai memakai cap, ini bermakna kamu tidak nampak rambutnya.

J: Tak setuju, *sebab saya nampak muka dan rambut beliau*, kerana jikapun beliau memakai cap, rambutnya masih boleh dilihat.

S: Bagaimana dengan pakaian Ah Thai.

J: Saya tak ingat.

S: Semasa kamu nampak Ah Thai di Tua Peh Kong di Matang, adakah beliau berambut.

J: *Ia berambut.*

(Page 30, Vol I of the appeal record).

So, in that part of his evidence SP6 was categorical that when the appellant was slashing the deceased, he saw the appellant's face. This actually underscored his

A evidence in the passage referred to in para 13 of this judgment that of the five persons who slashed the deceased, he identified only the appellant. The question is why the waver in his evidence? If it is true that he was able to identify the appellant as one of the persons who slashed the deceased because he saw the appellant's face when the appellant was slashing the deceased, there B should not be any waver in his evidence. Yet, under strain of cross-examination he disagreed with learned counsel's suggestion that actually he did not see the appellant was slashing the deceased because according to him he saw the back part of the appellant when the appellant slashing the deceased. This raises the nagging question which is the pivotal to the issue under scrutiny — whether C SP6 did actually see the appellant slashing the deceased as he claimed in his evidence? SP6's credibility and the weight to be attached to his evidence is therefore questionable. That, however is not the end of the matter. There is another matter which further weakens SP6's evidence in his identification of the appellant creating lingering doubts in the prosecution's case as to the D identity of the appellant as one of the culpable participants of the crime? It is this. In the passage in SP6's evidence which we have just referred to, SP6 said the appellant had hair (*berambut*). Indeed, this is also clear from his earlier evidence (p 29, Vol I of the appeal record):

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S:	Semasa kamu nampak kelima-lima orang menetak Ah Ki apakah warna rambut mereka.
J:	Saya nampak seorang berambut merah dan ada yang berambut kuning tetapi tak pasti berapa orang yang berambut kuning.
S:	*Ada yang botak.*
J:	*Tidak ada.*
S:	Adakah Ah Thai berambut kuning ketika itu.
J:	Saya tidak ingat tetapi saya cam mukanya sahaja.
S:	Adakah beliau iaitu Ah Thai berambut atau tiada berambut.
J:	*Beliau berambut.*

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In other words, according to SP6 all the five persons who slashed the deceased were not bald, and more importantly, SP6 said the appellant *was not bald*. This H clearly contradicted the evidence of SP8 who said that the appellant was bald at the material time. As would be recalled SP8 claimed that he was with the deceased when the latter confronted the driver of the car which had knocked them down earlier. SP8 said at the time when the driver of the car opened the door of the car, he *saw* the appellant seated in the middle of the back passenger I seat of car. When the driver was coming out of the car armed with a *parang*, the deceased shouted to him to run away, which he did. SP8 said about five minutes later he came back to the scene and saw the deceased lying on the floor of the shop across the road with multiple slash wounds. The cross-examination of SP8 on the description of the alleged five attackers runs as follows:

S: Berapa orang yang kamu lihat berada di dalam kereta yang melanggar motosikal kamu dan simati tersebut.

J: Lima orang.

S: Apakah warna rambut-rambut mereka.

J: Yang *saya ingat seorang tidak berambut* iaitu *botak* sementara warna rambut empat orang yang lain saya tak pasti.

S: Adakah kamu dapat melihat keseluruhan kepala orang yang botak tersebut.

J: *Ya, saya pasti beliau memang botak.*

S: Orang yang botak itu tidak memakai apa-apa topi atau cap.

J: Ya.

SP8 was firm. He made it very clear that the bald person (*orang yang botak tersebut*) was the appellant in answer to question by the learned trial judge:

> Saya tahu Tertuduh bernama Ah Thai kerana saya memang kenal beliau dan bercakap dengan beliau. Orang *yang berkepala botak* di dalam kereta itu yang melanggar motosikal saya dan simati *ialah Ah Thai iaitu tertuduh hari ini*. Pada masa berbincang di Matang, kepalanya juga botak.

[18] That contradiction, which in our view is material, in the light of the crucial issue of the identification of the appellant at the scene, raises the question of credibility of SP6 and SP8. It is primarily the evaluation of SP6's and SP8's evidence which would forge the essential finding as to the appellant's culpability on the offence charged by the operation of s 34 of the Penal Code, or whether there is a reasonable doubt that he was so culpable? Who was telling the truth? Was it SP6 or SP8?

[19] We have stated that participation of the individual offender in the criminal act in some form or the other is the leading feature of the principle of constructive liability under s 34 of the Penal Code. Thus, it is essential that there should be evidence of common intention, or evidence from which such common intention to commit the offence actually committed can properly be inferred (see *Shamsuddin bin Hassan & Anor v Public Prosecutor* [1991] 3 MLJ 314 at p 316; [1991] 1 CLJ Rep 428 at p 431 (SC); *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor*). In *Krishna Govind Patil v State of Maharashtra* 1963 AIR 1413, the Indian Supreme Court made the following observation about s 34 of the Indian Penal Code (similar to our s 34 of the Penal Code):

> It is well settled that common intention within the meaning of the section implied a pre-arranged plan and the criminal act was done pursuant to the pre-arranged plan. The said plan may also develop on the spot during the course of the commission of the offence; but the crucial circumstance is that the said plan must

A precede the act constituting the offence. If that be so, *before a court can convict a person under Section 302 read with Section 34 of the Indian Penal Code, it should come to a definite conclusion that the said person had prior concert with one or more other persons, named or unnamed, for committing the said offence* ...

B In *Mannam Venkatdri And Ors v The State of Andhra Pradesh* AIR 1971 SC 1467, the Indian Supreme Court held the failure on the part of the High Court to record any finding as to what was the common object or the common intention of the appellants to be fatal to the appellants' conviction for murder under s 302 read with s 34 of the Indian Penal Code. It stated:

C The High Court has not recorded any finding as to what was the common object or the common intention of the Appellants, nor has it recorded any finding as to what was the criminal act done by the Appellants in furtherance of their common intention ...

D **[20]** The mind of a trial judge can only be gathered from the contents of his judgment (see *Ng Yau Thai v Public Prosecutor* [1987] 2 MLJ 214 (SC)). Reverting to the instant appeal, in holding that the prosecution had made out a prima facie case against the appellant, the learned trial judge said:

E 11. While I agree with counsel that there is nothing conclusive about the forensic evidence of the said burnt car, *but having made the maximum evaluation of the evidence of SP5, SP6 and SP8 in their totality especially with regard to the identity of the accused person and his joint involvement with others in the attack on the deceased at the scene*, the intention of which was clearly to cause the death of the deceased considering the injuries multiple slash wounds suffered by the deceased as a result of such attack, I am satisfied that there is a prima facie case for the accused to answer as charged which I now add the word 'niat bersama' into it as follows:

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G Bahawa kamu bersama-sama empat orang yang masih bebas, pada 6/4/2006, jam lebih kurang 10 malam dihadapan No 17 Mk 9 Pekan Teluk Kumbar dalam Daerah Barat Daya, dalam Negeri Pulau Pinang dengan *niat bersama* telah melakukan kesalahan bunuh sehingga menyebabkan kematian Choi Yu Ki (No KP 851205-07-5141) secara menetak dengan menggunakan senjata parang, telah melakukan kesalahan yang boleh dihukum dibawah seksyen 302, Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun Keseksaan.

H **[21]** The aforesaid finding of the learned trial judge can be broken into two parts. Firstly, he held that 'having made the maximum evaluation of the evidence of SP5, SP6 and SP8 *in their totality especially with regard to the identity of the accused person*'. Secondly, he continued by saying that 'and *his joint involvement with others in the attack* on the deceased at the scene'. The first part

I appears to be rather general as it is vague and not helpful. The learned trial judge appears to have glossed over the material evidence with regard to identification and common intention. What is the meaning of the first part of his finding? What did he mean by saying 'the evidence of SP5, SP6 and SP8 in

their totality with regard to identity of the accused person'? SP5 did not identify the appellant. As for SP6 and SP8, we have demonstrated how SP6 contradicted himself in his own evidence and how his evidence materially contradicted SP8's evidence in respect of the description and thus the identification of the appellant. It is true that the learned trial judge did consider the discrepancy in the evidence of SP5 and SP6 respectively regarding the number of persons seen by them alighting from the car. However, there is nothing in his judgment to show that he had considered the material contradictions within SP6's own evidence, and the material contradictions between SP6's evidence and that of SP8 regarding the description and the identification of the appellant at the scene of the offence, let alone the ultimate vital question whether in view of the contradictions it was safe to rely on their evidence. That failure is a serious misdirection on the part of the learned trial judge in his handling of the issue of identification of the appellant which was so crucial to the question whether the prosecution had established a prima facie case against the appellant. In our view this misdirection (by way of non direction) alone is sufficient to warrant appellate intervention. Additionally, in the second part of his finding, which is the continuation of the first part of the finding, the learned judge said 'and his joint involvement with the others in the attack on the deceased at the scene, the intention of which was clearly to cause the death of the deceased'. According to the learned judge, this finding was made by him after 'having made the maximum evaluation of the evidence of SP5, SP6 and SP8 in their totality'. What did he mean by that? What did he mean by 'his joint involvement with the others in the attack on the deceased'? He did not make specific finding as to what appellant did or did not do in 'his joint involvement'. In his evidence in court SP6 did identify the appellant as one the attackers. However, as we demonstrated, there were contradictions within SP6's own evidence, and contradictions between SP6's and SP8's evidence which raise serious doubt on the identification of the appellant as one of the attackers of the deceased or as one of the culpable participants of the offence. As we have said the learned trial judge did not direct his mind to those contradictions in considering the issue of the identification of the appellant. There is also nothing to show that he had address his mind to these contradictions in considering what was the act done by the appellant in participating in the criminal act actually committed to make him liable by the operation of s 34 of the Penal Code. Indeed there is no finding made by him on the specific act done by the appellant in furtherance of the common intention which is crucial in a case such as this where reliance is placed on s 34 of the Penal Code. This is another serious misdirection made by the learned judge. We conclude that the learned trial judge had not made maximum evaluation of the evidence at the close of the prosecution's case, which in our view had occasioned a serious and substantial miscarriage of justice warranting appellate interference.

A **[22]** In the result, we allow the appeal. The conviction and sentence is set aside. The appellant is acquitted and discharged.

Appeal allowed and his conviction and sentence set aside.

B Reported by Kohila Nesan

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